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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

KENNETH CORY, CONTROLLER OF THE STATE OF CALIFORNIA and H. B. ALVORD, COUNTY TREASURER OF THE COUNTY OF LOS ANGELES,
Petitioners,

v.

MARK WHITE, ATTORNEY GENERAL OF THE STATE OF TEXAS, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY BRIEF ON CERTIORARI

Of Counsel:

MYRON SIEDORF
Chief Inheritance Tax Attorney
Division of Inheritance & Gift Tax
Office of the Controller
State of California

JEROME B. FALK, JR.*
MARTIN R. GLICK
STEVEN LEE MAYER
HOWARD, PRIM, RICE, NEMEROVSKI, CANADY & POLLAK
A Professional Corporation
650 California Street, Suite 2900
San Francisco, CA 94108
(415) 434-1600

DONALD SCOTT THOMAS
RHONDA H. BRINK
PAUL J. VAN OSSELAER
CLARK, THOMAS, WINTERS & SHAPIRO
Capital National Bank Building
Post Office Box 1148; 12th Floor
Austin, Texas 78767
(512) 472-8422

Attorneys for Petitioners
**Counsel of Record*

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I.

THE ISSUE OF WHETHER THIS COURT OR A FEDERAL DISTRICT COURT SHOULD RESOLVE DEATH TAX CONTROVERSIES BETWEEN STATES IS BOTH WORTHY OF REVIEW AND SQUARELY PRESENTED BY THIS CASE.

The Briefs in Opposition filed by the Texas taxing officials, Respondents White and Bullock, ("Tex. Br.") and by Respondent Lummis, ("Est. Br.") contend that because the Court of Appeals premised jurisdiction of this case on the now repealed provisions of California law which gave Petitioner Alvord a share of the California inheritance tax, the decision below is limited to the facts of this case and thus unworthy of review. (Tex. Br. 5-10; Est. Br. 5-7).

This contention lacks merit. This case squarely presents an issue of national importance: whether the Federal Interpleader Act (28 U.S.C. §1335) may be used to resolve an interstate dispute over Howard Hughes' domicile notwithstanding this Court's original exclusive jurisdiction of "controversies between two . . . States." 28 U.S.C. § 1251 (a). This issue transcends the factual underpinnings of the Court of Appeals' holding: its resolution does not depend on the intricacies of the Federal Interpleader Act or the vicissitudes of California's inheritance tax procedure. Resolution of this issue is necessary to provide guidance for states, executors and administrators of estates, and attorneys providing premortum counseling. *See* Pet. 14 n.15. Even Respondent Lummis concedes that "review by this Court may be warranted" of "the problem of interstate death tax controversies." (Est. Br. 7). This case squarely presents that problem, because the Court of Appeals' decision is wholly at odds with the exclusive grant of jurisdiction to this Court to resolve such controversies.[1]

Respondents White and Bullock contend that this case does not present a controversy between states. (Tex. Br. 12).

[1] Both Briefs in Opposition assail Petitioners for failing to raise this precise issue in the lower courts. (Tex. Br. 4, 12 n.5; Est. Br. 6). The charge is true, but irrelevant, since jurisdictional issues may be raised at any time, even in this Court. *Edelman* v. *Jordan*, 415 U.S. 651, 677 (1974). The change in Petitioners' position is not as great as Respondents imply, since Petitioners have always taken the position that the action, as presently framed, cannot be maintained under 28 U.S.C. § 1335. Petitioners' failure to raise the issue earlier is frankly the result of their failure to see it.

But, as shown in the Petition (Pet. 8-9 & n.10), now that interpleader has been invoked, California and Texas are directly adverse, not only to the Estate, but also to each other. The Petition and Briefs in Opposition clearly show that Texas and California have taken diametrically opposed positions on every issue involved in this litigation: jurisdiction, venue, and the merits.[2]

The Texas taxing officials further argue that even if this suit is an interstate controversy (and thus within the grant of exclusive original jurisdiction under 28 U.S.C. § 1251 (a)), district court jurisdiction of this case is nonetheless proper under 28 U.S.C. § 1335. (Tex. Br. 13-14). Respondents rely for this proposition on three cases[3] which upheld district court jurisdiction of suits by the United States against states despite the fact that the then-existing statute providing for original jurisdiction in this Court (28 U.S.C. § 341 (1940)), gave this Court exclusive jurisdiction "of all controversies of a civil nature where a state is a party . . . ." Respondents argue that a similar implied exception to Section 1251(a) applies to this case.

These cases do not carry the weight which Respondents seek to place upon them. They merely hold that the broad grant of exclusive original jurisdiction contained in prior Section 341—which dated back to the Judiciary Act of 1789—was superseded by specific and subsequent Congressional grants of jurisdiction to the district courts to consider cases brought by the United States under particular federal regulatory schemes. This principle is inapplicable here, for several reasons.

First, these cases turn on the principle that, in each, the statute granting district court jurisdiction had been enacted *later*

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[2] Respondents contend that Petitioners have acted improperly by styling this case *Controller of the State of California* v. *Attorney General of the State of Texas* and that the appropriate style should be *Cory* v. *Lummis*. But "counsel is not bound by the caption used in the court below; he is free to clarify or improve it so as to portray accurately the adversary position of the contending parties before the Court." Stern and Gressman, SUPREME COURT PRACTICE 439 (5th ed. 1978). As this case now stands, Petitioners are on one side of the issues tendered to the Court, while the Texas taxing officials are on the other. The caption of the case thus "reflects the actual alignment of the parties as they appear before [the] Court." *Id.*

[3] *United States* v. *California*, 297 U.S. 175 (1936); *Case* v. *Bowles*, 327 U.S. 92 (1946); *Minnesota* v. *United States*, 125 F.2d 636 (8th Cir. 1942).

than the original jurisdiction statute and thus carved out an implied exception to it.[4] In this case, however, the situation is exactly the reverse, since the Federal Interpleader Act was adopted in 1936, twelve years before the Court's exclusive jurisdiction over controversies between states was made explicit by Congress. Act of June 25, 1948, c. 646, 62 Stat. 927. The earlier statute cannot have impliedly repealed the latter.

Second, because Congress is free to make the original jurisdiction exclusive or concurrent (*Ames* v. *Kansas,* 111 U.S. 449 (1884)), whether Section 1335 provides an exception to Section 1251(a) is ultimately a question of legislative intent. Yet Respondents have made no showing that the Interpleader Act was intended to achieve this result. And the legislative history of Section 1251(a)—as well as its plain language—demonstrates that Congress meant to provide this Court with jurisdiction over *all* controversies between states. Section 1251(a) gives this Court "original *and exclusive* jurisdiction over *all* controversies between two ... States." (Emphasis added). It would be difficult to imagine language which more clearly evinced a Congressional disinclination to foster judicially-created exceptions to the grant of exclusive jurisdiction.

The 1948 Reviser's Note to 28 U.S.C. § 1251(a) fully supports the conclusion that Congress meant what it said. The note indicates that Congress sought to put the exclusive character of the Court's original jurisdiction over controversies between states on a firm and unambiguous footing while, at the same time, it ratified the holding of the cases cited by Respondents by providing for original but *not* exclusive jurisdiction over suits between the United States and the states. Indeed, the revisers were quite aware of the ambiguity in the Court's

[4] Thus, in the leading case, *United States* v. *California, supra,* the Court cited three cases for the proposition that Section 341's grant of exclusive original jurisdiction was superseded by the grant of jurisdiction to the district courts under the Federal Safety Appliance Act. *United States* v. *Yuginovich,* 256 U.S. 450 (1921); *United States ex rel. Chandler* v. *Dodge County,* 110 U.S. 156 (1884); and *United States* v. *Tynen,* 78 U.S. (11 Wall.) 88 (1871). None of these cases has anything to do with jurisdiction; rather, they all stand for the principle that "a later statute repeals former ones when clearly inconsistent with the earlier enactments." *United States* v. *Yuginovich,* 256 U.S. at 463, citing *United States* v. *Tynen, supra.* Hence, the linchpin of these cases is not a jurisdictional principle, but rather a canon of statutory construction which, as shown in text, is inapplicable to this case.

revisers were quite aware of the ambiguity in the Court's exclusive original jurisdiction which the cases cited by Respondents (and others) had created *and sought to eliminate it*, by splitting the original jurisdiction into exclusive and

The latest revision of Section 1251(a) underscores the importance which Congress has attached to the Court's exclusive jurisdiction over controversies between states. In 1978, because Congress felt that the Court "should not be burdened with such litigation on its original docket" (1978 U.S. Code Cong. & Admin. News 1935, 1946), Section 1251 was amended to make the Court's original jurisdiction over actions and proceedings against ambassadors and public ministers of foreign states concurrent rather than exclusive. Diplomatic Relations Act, Pub. L. 95-393, § 8(b), 92 Stat. 810 (1978). Yet Congress, obviously aware of this Court's docket problems, did not disturb the grant of exclusive original jurisdiction over controversies between states. Thus, Congress' last word on the subject was to confirm that this Court is obliged to exercise exclusive jurisdiction over all such controversies otherwise properly before it.

Third, the cases cited by Texas are distinguishable for yet another reason. Each case involved a statute which granted jurisdiction to the district courts of actions brought by the

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[5] The note provides, in relevant part:

"Sections 341 and 371 of Title 28, U.S.C. 1940 ed., did not confer *expressly* exclusive jurisdiction on the Supreme Court in civil cases between states . . . *as has been provided in subsection (a) (1) of the revised section. The language at the beginning of said section 341* [*i.e.*, the language involved in *United States* v. *California, supra*, and the other cases], *for which said subsection has been substituted, was ambiguous* and made it appear that an action by a State against the United States would be within the exclusive jurisdiction of the Supreme Court. However, in *U.S.* v. *Louisiana*, 1887, 8 S.Ct. 17, 123 U.S. 32, 31 L.Ed. 69, the Supreme Court, in a case appealed from the Court of Claims, held to the contrary.

"So, also, in actions by the United States to condemn lands of a State or to enforce penalties for violation of a Federal statute against a State-owned utility, the United States district courts have jurisdiction. *See United States* v. *State of Utah* [283 U.S. 64 (1931)]; *United States* v. *4,450.72 Acres of Land, Clearwater County, State of Minnesota*, D.C. Minn. 1939, 27 F. Supp. 167, affirmed 125 F.2d 636; *United States* v. *State of California*, [297 U.S. 175 (1936)]." (28 U.S.C.A. § 1251, note. (Emphasis added)).

United States pursuant to a specific federal regulatory scheme. The exceptions to the Court's exclusive jurisdiction created by these cases were thus quite narrow and tailored to the federal government's need to have a convenient forum in which to try essentially local controversies.[6]

The exception to exclusive jurisdiction which the Texas taxing officials are attempting to create here is something else again. Unlike the statutes involved in the three cases, which could only be invoked by the United States, the Interpleader Act may be invoked by any private party meeting the minimal jurisdictional prerequisites. Under Respondents' logic, any private party faced with conflicting state claims such as double taxation or double escheat could compel sovereign states to litigate against each other in actions not of their own making and in forums not of their own choosing. No such exception to the grant of exclusive jurisdiction over controversies between states has ever been or should now be implied.

Fourth, and finally, Respondents' argument proves too much. If the general language of the Federal Interpleader Act supersedes the exclusivity provision of Section 1251(a), then surely other grants of district court jurisdiction create similar exceptions. For example, if one state sought to sue another for an antitrust violation or a violation of a federal statute otherwise affecting commerce (*see, e.g., California* v. *Texas*, No. 87,

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[6] All three of these cases involved controversies which, although between the United States and a state, involved only a local matter. Thus the Court noted in *United States* v. *California* that cases arising under the Safety Appliance Act "often require[] the presence, as witnesses, of railroad workers, shippers and others of the locality." 297 U.S. at 188. *Case* v. *Bowles* involved a sale of state land, obviously a matter of essentially local import. And *Minnesota* v. *United States* was a condemnation proceeding, which the Court of Appeals held was "the sort of proceeding which, for the convenience of all parties interested, should be brought in the district where the land is located." 125 F.2d at 639. Thus, in each of these cases, there were "considerations which undoubtedly led to the command that the suit should be brought in the district court of the 'locality' where [the events in controversy] occur[red]." *United States* v. *California*, 296 U.S. at 188.

This action, in contrast, is hardly a local controversy. In the last ten years of his life alone, Howard Hughes lived in three states and five foreign countries. Relevant witnesses are scattered throughout the United States; in fact, of the seventy-three witnesses who appeared at the state court domicile trial, thirty-three (46%) lived in California while only fifteen live in Texas. R.I. 86, 97 & Exhibits A-1 and A-2. Thus, the strong policy interest in having local controversies settled in a local district court is not present here.

Original), under Respondents' theory, the matter could be heard in a federal district court. The same would be true of a suit brought by one state against another which involved a federal question. *E.g., Arizona* v. *California,* 373 U.S. 546 (1963). Respondents' theory would turn the exclusivity provision of Section 1251(a) into a dead letter.

Since the Interpleader Act is not an implied exception to Section 1251(a), the Court of Appeals' decision falls afoul of this Court's exclusive original jurisdiction to resolve controversies between states. This Petition thus squarely presents the Court with an opportunity to determine how interstate domicile disputes shall be resolved. The leading casebook on federal courts recently noted that "[t]he question of the Court's jurisdiction to adjudicate cases involving conflicting state death tax claims has been cast into confusion by *California* v. *Texas.*" P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 98 (2nd ed. 1981 Supp.). This case presents the Court with an opportunity to dispel that confusion once and for all.

II.

THIS ACTION DOES NOT MEET THE JURISDICTIONAL PREREQUISITES OF THE FEDERAL INTERPLEADER ACT.

Even if Section 1251(a) did not prevent the district courts from resolving interstate domicile disputes, the Federal Interpleader Act would not provide jurisdiction. The state taxing officials who will necessarily be the principal defendants in such cases are not "citizens of a state" for diversity and interpleader purposes because their states—which have no citizenship—are the real parties in interest and thus the true interpleader claimants. (Pet. 10-12). The Court of Appeals found jurisdiction in this case only because, at the time the Complaint was filed, Petitioner Alvord would have received a small percentage of the California tax if Hughes were determined to have been a California domiciliary. Since this aspect of California law has now been repealed (Pet. App. 36i, 38i), the Court of Appeals erred in holding that the District Court had interpleader jurisdiction of this action. (Pet. 18-23).

Respondents White and Bullock respond to this contention merely by citing *Mollan* v. *Torrance,* 22 U.S. (9 Wheat.) 537

(1824), and cases following, which hold that jurisdiction depends on the state of affairs at the time the action is commenced. (Tex. Br. 6-7). This general statement fails altogether to respond to the score of cases cited in the Petition which show that, despite that rule, the addition or deletion of a party after the filing of the complaint forces a redetermination of diversity jurisdiction. (Pet. 19-20).

Respondent Lummis's response is more sophisticated. He contends that Petitioner Alvord's interest has been transferred to Petitioner Cory and that this case is therefore analogous to cases which have held that assignment of a claim from a diverse to a non-diverse party will not oust the court of jurisdiction. (Est. Br. 13-14).

This argument fundamentally mischaracterizes California's revision of its inheritance tax procedure. Petitioner Alvord's claim has not been assigned to Petitioner Cory. Instead, Petitioner Alvord's claim has simply disappeared. Even if Hughes is ultimately found to have been a California domiciliary, Petitioner Alvord's alter ego—the County of Los Angeles—will not receive a penny. It is therefore incorrect to say, as does Respondent, that "no claim against the fund has been abandoned . . . ." (Est. Br. 13). Petitioner Cory has appeared in this action not as the "assignee" of a claim previously held by Petitioner Alvord, but because he represents California's interest in this litigation and has from its inception when he was named as a party by Respondent Lummis.

The analogy to assignment overlooks the fact that these Petitioners are state and local officials, not private citizens. Unlike private parties, they are not free to exchange causes in action at will, but rather have only such duties and responsibilities as may be granted by statute. The action of a sovereign state in removing previously vested responsibilities from a public officer simply cannot be analogized to the assignment of a claim between two private parties. The cases cited by Respondent Lummis are therefore irrelevant.[7]

[7] The fear voiced by Respondents (Est. Br. 13 n.8; Tex. Br. 7) that state officials will shift responsibilities to avoid federal jurisdiction is chimerical. After all, federal courts have been able since *Ex Parte Young* to restrain unconstitutional conduct by state and local officials. Yet Respondents have cited no case where a state sought to evade federal jurisdiction by evasive transfers of responsibility from one official to the next. Indeed, Respondent Lummis concedes that no such motive was present here. (Est. Br. 13 n.8).

III.

THE WRIT SHOULD ISSUE TO REVIEW THE COURT OF APPEALS' DECISION ON VENUE.

If, despite the arguments presented above, interstate controversies over domicile are to be heard in federal district court, the next logical question is which district court shall hear them. The Petition therefore urged the Court to review the Court of Appeals' decision that California must litigate its dispute with Texas before a jury composed of Texas citizens. (Pet. 23-30).

The most interesting fact about Respondents' submissions on this question is not what has been said, but who has said it. Respondent Lummis, who chose the Texas forum, treats the venue issue in a footnote. (Est. Br. 11 n.5). Conversely, Respondents White and Bullock, the Texas taxing officials—who did not choose the forum, but who contend that Texas was Hughes' domicile—devote seven pages to the issue. (Tex. Br. 14-21). Indeed, the Texas officials state that they have decided not to seek review of the Court of Appeals' opinion (despite what they claim is an "obvious conflict" between that decision and *Worcester County Trust Co.* v. *Riley*, 302 U.S. 292 (1937)),[8] because they have concluded that Texas is "the most appropriate and efficient forum" for the litigation. (Tex. Br. 11). The fact that it is the Texas taxing officials, rather than Respondent Lummis, who have taken up the cudgels on the venue issue illustrates quite clearly which parties stand to benefit most from a Texas forum.[9]

The certworthiness of the issue is plain. Respondent Lummis himself admits that "the problem of interstate death tax controversies" may warrant review. (Est. Br. 7). A central

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[8] This conflict raises an Eleventh Amendment issue which is jurisdictional (*Edelman* v. *Jordan*, 415 U.S. 651, 677 (1974)) and may thus be reviewed by the Court despite the parties' failure to raise it.

[9] It may be wondered why Respondent Lummis, who claims Nevada as the domiciliary state, should have filed this action in Texas, if a Texas forum is as potentially unfair as Petitioners claim. While Petitioners cannot speak to the subjective motivations which lay behind the filing of this lawsuit in Austin, it is worth noting that because the Texas inheritance tax rate is only 16% (the amount of the federal tax credit), it will make no difference to the Estate whether Texas or Nevada is determined to be Hughes' domicile. From the viewpoint of minimizing state inheritance taxes, the Estate's primary interest is to defeat California, since its 24% tax, unlike the 16% Texas tax, will not be paid by the Estate exclusively from dollars which would otherwise go to the federal government. Indeed, it may well be that the Estate saw a Texas forum as the surest opportunity to defeat the California claim.

aspect of that problem is providing the contending states with a forum which properly respects their status as competing sovereigns. Should the Court rule that interstate domicile disputes are within its exclusive original jursidiction, that problem will be solved. But if it holds that disputes of this kind may be settled in a district court, the problem of providing the states with a "neutral forum" will remain.[10]

Respondents White and Bullock urge that voir dire and instructions from the bench will eliminate any possible bias. (Tex. Br. 19). This might be an appropriate response if the only objection to trial in Texas were prejudicial pretrial publicity. But neither voir dire or jury instructions will avoid the submission of the case to jurors who have (and whose family, friends, neighbors and co-citizens also have) a significant pecuniary interest in the outcome. Nor will they remedy the affront to state sovereignty which will occur if California is compelled to litigate its dispute with Texas in that state or the appearance of injustice which would inevitably result should a Texas jury return a verdict favoring its home state.[11]

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[10] Respondents White and Bullock chide Petitioners for having moved in the alternative to transfer this action to California, contending that this alternative motion somehow undercuts Petitioners' insistence on a "neutral forum." (Tex. Br. 4). But the motion to transfer this action to Los Angeles was clearly framed as the least preferable of the two possible venue transfers; it was expressly premised on the assumption that the district court had rejected Petitioners' submission that a neutral forum was required. The alternative motion merely contended that if trial were to be held in a "non-neutral" forum, Texas was no more entitled to a Texas forum than California was entitled to a California one. *See* Reply Brief of Cross-Appellants filed in the Court of Appeals at 16-17 n.16.

[11] Respondents also argue that the District of Colorado is not a permissible transferee forum. (Tex. Br. 15-17). If they were right, then the difficulty of finding a neutral forum under the Federal Interpleader Act as presently constituted would be an additional reason why that remedy is unsuitable for resolving death tax controversies between states. (Pet. 12-14). But their contention is erroneous. The twenty-two persons whom Petitioners sought to add below are believed by the Estate's Administrators to be the legitimate heirs of Howard Hughes. They are clearly "claimants" within the meaning of the Interpleader Act since they "may claim" an interest in money or property within Respondent Lummis' custody or possession. 28 U.S.C. § 1335(a)(1). And the addition of the heirs as parties is required, despite the presence of the Administrators, because the California inheritance tax falls on the heirs personally and extends to their personal assets—as to which no administrator could bind the heirs—as well as the assets they might receive from the Estate. Cal. Rev. & Tax. Code § 14322. The heirs could and should have been joined, thus making possible the transfer to a neutral forum which Petitioners have sought throughout this litigation.

Finally, the Texas officials contend that this case should not be transferred to Colorado because the burdens of jury duty "ought not to be imposed upon the people of a community which has no relation to the litigation." (Tex. Br. 20, citing *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501, 508-09 (1947)). While there is undoubtedly a "local interest", as the Court said in *Gilbert,* "in having localized controversies decided at home" (330 U.S. at 509), this action is not a "localized controversy". *See* n. 6, *supra.* The interest of justice in providing an impartial forum cannot be thwarted merely because to do so would transfer litigation from a forum with too much "local interest" to a disinterested one. It is precisely the lack of connection between this litigation and the District of Colorado which makes that forum a suitable one for trial of this interstate controversy.

CONCLUSION

The Petition should be granted.

DATED: April 27, 1981.

Respectfully,

Of Counsel:

MYRON SIEDORF
Chief Inheritance Tax Attorney
Division of Inheritance & Gift Tax
Office of the Controller
State of California

JEROME B. FALK, JR.*
MARTIN R. GLICK
STEVEN LEE MAYER
HOWARD, PRIM, RICE, NEMEROVSKI, CANADY & POLLAK
A Professional Corporation

DONALD SCOTT THOMAS
RHONDA H. BRINK
PAUL J. VAN OSSELAER
CLARK, THOMAS, WINTERS & SHAPIRO
Attorneys for Petitioners Cory and Alvord
**Counsel of Record*